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No. 702

# In the Supreme Court of the United States

OCTOBER TERM, 1961

RAPID TRANSIT COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, p. A1) is reported at 295 F. 2d 465. The district court did not write an opinion. Its memorandum of decision, preliminary judgment and order confirming report and supplemental report of commission, and final judgment and order of distribution appear at pages 23, 25, and 31 of the printed record on appeal.

### JURISDICTION

The judgment of the court of appeals was entered on October 10, 1961 (Pet. App. A, p. A6). A timely petition for rehearing *en banc* was denied on November 13, 1961 (Pet. App. A, pp. A6–A7). The petition for a writ of certiorari was filed on February 5,

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the commission's findings and award in this condemnation proceeding were correctly found to be not clearly erroneous.

## RULES INVOLVED

The relevant portions of Rules 52, 53, and 71A of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra*.

## STATEMENT

The United States instituted condemnation proceedings to obtain the fee simple title to approximately five acres of unimproved land within the city limits of Lawrence, Kansas, for military and other purposes (R. 1-2). On petitioner's motion the district court referred the issue of compensation to commissioners under Rule 71A(h), F.R. Civ. P. The hearings before the commissioners disclosed that under the applicable zoning regulation, the condemned land was in Zone A, a single-family dwelling classification, at the dates of taking and valuation hearings (R. 39, 45). Zones B, C and D were for duplexes, multiple-family dwellings and local businesses, respectively (R. 40). Petitioner's witnesses expressed the opinion that rezoning the area which included the condemned land to Zone C "would be in order" (R. 43) and that if an application for rezoning to Zone C were filed its approval would be "highly probable" (R. 44, 52-53, 75). After hearing evidence of both parties and viewing the land, the commissioners filed their

report (R. 7). They found that the highest and best use of the unimproved land was for Zone A purposes, as was testified to by the government's experts. The commissioners also found that the market value for that use was $17,500, an amount within the range of petitioner's and the government's valuation evidence for Zone A uses.

The district court recommitted the case to the commissioners "with instructions that the findings * * * be amplified so as to indicate the factors considered by the Commission in arriving at the reasonable market value of the land taken" (R. 14). The commission's supplemental report recited, *inter alia*, that petitioner did not sustain the burden of showing a reasonable probability of rezoning for Zone C purposes in the near future, that the highest and best use of the land was for single-family dwellings in Zone A in accordance with the zoning ordinance, and that its viewing of the property was a significant factor in its determination of market value (R. 16–17).

The district court affirmed the award, ruling that the commission's findings were supported by substantial evidence and not clearly erroneous[1] (R. 23–28). In affirming, the court of appeals refused to reweigh the evidence and to retry the facts, emphasizing that "the award was well within the range of credible testimony * * *" (Pet. App. A, p. A5).

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[1] The court observed that it might well have found market value in a larger amount on the same conflicting "opinion evidence".

## ARGUMENT

This case presents only the narrow factual question whether both courts below correctly held that the commission's findings of just compensation were not clearly erroneous. Those holdings were clearly correct, and there is no occasion for this Court to review that determination.

1. Petitioner challenges (Pet. 12–15) the evidentiary support for the finding that the highest and best use of the condemned land was for Zone A (single-family dwelling) purposes, rather than for the more valuable Zone C (multiple-family dwelling) purposes. Both courts below held, however, that this finding was not clearly erroneous, and that conclusion is fully justified by the record. As the court of appeals pointed out (Pet. App. A, pp. A4–A5), although the landowner's testimony "indicating a * * * probability that a favorable rezoning classification could be obtained was not directly contradicted and was a proper and indeed necessary factor" for the commission to consider, the "findings and conclusions now questioned show that such consideration was given to the landowner's contentions but that the burden of persuasion was not met." The commission's award is supported by the following facts: (1) the government's experts had testified that use of the property for single-family dwellings constituted the highest and best use; (2) no specific steps, such as would influence a prospective buyer, had been taken to change the classification of the condemned land to Zone C, and a prior attempt to rezone it to Zone D had been unsuccessful; and (3) since the commission's award was higher than that given by the gov-

ernment's witnesses, it may have reflected the commission's assessment of the additional amount that a willing buyer would pay for the possibility that the property might be rezoned. In these circumstances, the commission was not required to base its award on the landowner's testimony that the property probably could be rezoned to Class C.

2. Petitioner further contends (Pet. 8-12)[1] that the court of appeals applied the wrong standard in testing the evidentiary support for the findings. It urges that, instead of applying the "clearly erroneous" standard prescribed in Rule 52(a) for reviewing findings of fact in non-jury cases, the court applied the standard used in testing the evidentiary support for a jury's verdict. The opinion of the court of appeals shows on its face, however, that the court applied the proper standard of review. The court stated (Pet. App. A, pp. A2-A3) that "[t]he trial court's recognition that the findings of the commissioners must be upheld unless clearly erroneous is manifestly a correct limitation upon that court's review of such findings"; and that "in turn, we recognize the same limitation upon appellate review. This court will not set aside the judgment of a trial court, based upon findings, unless a review of the evidence results in a definite and firm conviction that substantial justice has been defeated by a manifest mistake." This was a correct statement of the governing law. As this Court stated in *United States* v.

[1] Review of findings of fact in condemnation cases tried by a commission is governed by Rule 53(e)(2) rather than, as petitioner assumes, by Rule 52(a). The distinction is immaterial, however, since both rules apply the "clearly erroneous" standard.

*United States Gypsum Co.*, 333 U.S. 364, 395. "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
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MARCH 1962.

# APPENDIX

## Rules Involved

Rule 52, F.R. Civ. P., provides, in relevant part, as follows:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 53, F.R. Civ. P., provides, in relevant part, as follows:

> * * * * *
>
> (e) Report.
>
> * * * * *
>
> (2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept

the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Rule 71A(h) provides:

"(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.